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In the Supreme Court of the United States

OCTOBER TERM, 1950

No.

UNITED STATES OF AMERICA, PETITIONER

v.

WALTER B. STEWART, SINCLAIR STEWART AND DONALD STEWART

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on January 10, 1951.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division (R. 23) is not reported. The opinion of the United States Court of Appeals for the Seventh

Circuit on petition for rehearing (R. 30-44) is reported at 186 F. 2d 627.

JURISDICTION

The original opinion and judgment of the court of appeals was entered on September 5, 1950 (R. 29-30). A petition for rehearing was denied on January 10, 1951, in an opinion which withdrew the original opinion and judgment (R. 30, 40). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether personal injury claims based upon allegedly negligent storage of smoke grenades within a United States military reservation, where the grenades were stored in full compliance with the requirements of the appropriate Army regulations, may be maintained under the Federal Tort Claims Act despite its express exclusion of (1) claims based upon an act or omission of a Government employee, exercising due care, in the execution of a statute or regulation and (2) claims based upon the performance of a discretionary function by a Government agency or employee, whether or not the discretion involved be abused.

2. In order to avoid imposition of liability on the United States under the Federal Tort Claims Act, must Army storage of smoke grenades within a United States military reservation in Illinois conform to Illinois state laws governing the storage of explosives, rather than to the appropriate

Army regulations governing the storage of smoke grenades.

3. In reversing a district court's grant of summary judgment for the defendant, may the court of appeals deny the defendant the right to a trial on the merits by directing entry of summary judgment for the plaintiffs on the theory that motions by both sides for summary judgment had removed all disputed issues of fact.

STATUTES INVOLVED

Sections 1346(b), 2674 and 2680(a) of Title 28, United States Code (1946 ed., Supp. III) [formerly provisions of the Federal Tort Claims Act],[1] and the pertinent provisions of the Illinois Act of July 12, 1939 (Laws of Illinois, 1939 p. 508) are set forth in the Appendix, *infra*, pp. 23-29.

STATEMENT

The undisputed facts are as follows: During the first three months of 1947, the Army stocked a supply of M15 hand smoke grenades within the Fort Sheridan, Illinois, military reservation (R. 3, 13). The grenades were packaged in wooden packing boxes containing 25 grenades each (R. 3, 14).[2]

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[1] The Federal Tort Claims Act (60 Stat. 842, 28 U.S.C. 921 *et seq.*) was repealed, but its provisions were revised and reenacted into law as 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 by the Act of June 25, 1948, effective September 1, 1948 (62 Stat. 683, 862, 28 U.S.C. (1946 ed., Supp. III)).

[2] Under Army regulations, 16 or 25 grenades are packed in boxes in individual cylindrical fiberboard containers. Army Technical Manual 3-300, Miscellaneous Chemical Munitions (March 1950), pp. 26, 28. Each grenade, when ready for use,

In addition to markings on the boxes which indicated the nature and specifications of the grenades, the word "fireworks" was printed on the sides of the boxes (R. 20).[3] About 20 of these boxes were stored in a portion of the reservation known as the Magazine Area, which was specially "surrounded by a high wire fence with barbed wire on top" (R. 17). The fence was six feet high, made of woven wire and topped by three strands of barbed wire which made the fence an additional foot higher (R. 13-14, 20). In accordance with Army directions, the boxes of grenades were stacked in the open, not within a building, and were covered over the top with a tarpaulin. (R. 14).

The Magazine Area was restricted to all persons except those who were given access to it by the Post Ordnance Officer (R. 22). Two large signs near the Magazine Area read: "Explosives—Re-

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weighs one pound and fourteen ounces. *Id.* at p. 42. When packed 16 to a box the total weight, including the container and packing material, is 50 pounds. *Id.*, p. 26. When packed 25 to a box, as in the instant case (R. 3), the box therefore weighs approximately 70 pounds. The box itself is lined with heavy waterproof paper and is bound with a nailless steel strapping. *Id.* at p. 28.

[3] Smoke grenades contain white phosphorus which burns on contact with air and emits smoke for about 60 seconds. These grenades are used mainly for screening and incendiary purposes and are classed as chemical ammunition. Army Technical Manual 3-300, Miscellaneous Chemical Munitions (March 1950), pp. 42-43. Since the Interstate Commerce Commission regulations apply to shipments of chemical ammunition (Army Ordnance Safety Manual, Form No. 7224, May 3, 1945, p. 139), the word "fireworks" evidently appeared on the grenade boxes in accordance with those regulations. 49 C.F.R. 73.64(e), (f).

stricted Area—All Unauthorized Persons Prohibited" (R. 22). A large sign, approximately three feet by four feet, posted on the roadway leading to the Magazine Area, read: "Danger, Military Explosives, This Road Closed to Public Traffic" (R. 14). About eight other signs in the vicinity of the Magazine Area read: "Danger—No Open Fires, Lighters, or Matches" (R. 22). While no guard was permanently stationed at the Area, it was checked by a roving patrol, maintained 24 hours a day for the entire Fort Sheridan reservation. (R. 14).

Although the Magazine Area was restricted, other grounds within Fort Sheridan were open to the public, which was permitted to enter or leave through various gates in the outer fence surrounding the entire installation (R. 12-13). The Magazine Area and the boxes of grenades could not be seen by anyone standing outside that outer fence, but the boxes "may have been visible through the wire cyclone fence in the immediate vicinity of the Magazine Area" (R. 14, 20).

Several of these boxes of smoke grenades were stolen one night in the early part of 1947 by three high school boys, Robert Toogood, age 15, George Baldwin, age 17, and his younger brother, Leslie Baldwin (R. 16, 17, 31, 42). The boys had come into the Fort through an open, broken gate in the outside fence without permission by the Army authorities (R. 17, 42). When they reached the

Magazine Area, they had to scale the "high wire fence with barbed wire on top," in order to get inside (R. 17). Once "inside this fence [they] found" 20 boxes of grenades which "were covered with a canvas on top, but [they] could see the word 'fireworks' on the side of the boxes" (R. 17). The boys "took four boxes [each of which weighed approximately 70 pounds, *supra,* p. 4] over the [high barbed-wire] fence", and hid the boxes in the woods north of the Fort (R. 17-18). Later, the boys "read the directions" for firing the grenades and exploded several of them (R. 17). Toogood took one box of the grenades home (R. 17). On September 10, 1948, about 18 months after the theft of the grenades from the Fort had taken place, respondent Sinclair Stewart, age 8, and his six-year old brother, respondent Donald Stewart, discovered a box of grenades in a vacant lot next to the Baldwin residence in Lake Forest, Illinois (R. 5, 42). The Stewart boys exploded one of the grenades causing serious injuries to themselves (R. 5).

On December 27, 1948, this suit was brought by the Stewart boys and their father, respondent Walter B. Stewart (R. 2). The complaint alleged that the boxes of grenades were marked "fireworks" and that they were therefore "attractive" to youths and small children (R. 3). It also asserted that the laws of the United States and the regulations of the United States Army require

certain precautions and safeguards in storing, handling, and guarding such grenades;[4] that the Government and its employees and officers were under a duty to handle and store the grenades in accordance with those laws and regulations, and that it was also their duty to exercise a high degree of care so as to prevent the grenades from falling into irresponsible hands; that the employees and officers of the United States negligently failed in the performance of such duty "in that they wrongfully and negligently placed said fireworks and grenades on the open ground not inside of any building or magazine but merely within a so-called magazine area surrounded by a wire fence, where said fireworks were clearly visible" (R. 4).[5] After setting forth the facts concerning the theft of the grenades by the high school boys and the discovery of a box of the grenades by the Stewart boys, the

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[4] The complaint, as originally filed, also referred to the duties imposed by the "statutes and rules of the State of Illinois" which required storage of explosives in magazines constructed of brick, concrete, iron or wood covered with iron. The United States moved to strike this portion of the complaint concerning any duties arising under the laws of the State of Illinois "for the reason that the statutes of the State of Illinois referred to are immaterial and have no application to the lands belonging to the United States of America" (R. 9). At a pretrial conference, plaintiffs were given leave to amend the complaint so as to strike out the reference in their complaint to the duties arising under the laws of Illinois (R. 9).

[5] Although the complaint alleged that the grenades were "clearly visible" to those who frequented the reservation, respondents later stipulated that the Magazine Area in which the grenades were stored "is not visible to persons standing outside the fence which surrounds the military reservation" (R. 20).

complaint demanded $75,000 for Sinclair's personal injuries, $5,000 for Donald's personal injuries and $15,000 for medical expenses incurred by their father, Walter (R. 5-6).

The United States filed an answer denying the material allegations of the complaint (R. 7). The answer specifically denied the allegations that the grenades were packaged so as to be attractive to youths and small children and that youths and small children frequented the Fort (R. 7). It also denied the breach of any duties imposed by any applicable statute or regulation (R. 7). Subsequently, in an answer to plaintiffs' interrogatories, the United States stated that during the first three months of 1947 the public was permitted to enter or leave the Fort through designated gates and that it had "free access to the building area", but that it was "restricted to [that] area and certain portions of the military reservation were designated as restricted areas" (R. 12-13).

Following the filing of its answers to the complaint and interrogatories, the United States moved for summary judgment (R. 15). Respondents then filed a cross-motion for summary judgment (R. 16). Both sides submitted affidavits in support of their motions (R. 16-19, 21-22). Both sides also stipulated that the Army, during the early months of 1947, stored the smoke grenades packed in boxes with the word "fireworks" printed on the side of the boxes; that the boxes were within

the fenced Magazine Area covered by a canvas tarpaulin, but were not within the Magazine; and that the Magazine Area was not visible to persons outside the fence surrounding the military reservation (R. 20). The facts stated above (pp. 3-6) are those shown by the pleadings, answers to interrogatories, affidavits, and stipulation.

The district court overruled the respondents' motion for summary judgment, allowed the motion of the United States for summary judgment, and dismissed the complaint (R. 23). Respondents appealed from the overruling of their motion for summary judgment, from the grant of the motion of the United States for summary judgment, and from the dismissal of the complaint (R. 24).

The Court of Appeals for the Seventh Circuit, by a divided court, reversed (R. 30-44). For the majority, Judges Major and Swaim held that the Government's storage of the smoke grenades was negligent and that that negligence was the proximate cause of plaintiffs' injuries. In finding negligence on the part of the Government, the court relied heavily on the failure of the United States to conform to the Illinois statute which requires that explosives be stored within a building (R. 32-33). However, apart from the statute, the court was of the view that the Government "was negligent in the manner of its storage of the grenades both as a matter of fact and of law" (R. 35). The court also assumed that the cross-motions for summary judgment had left "undisputed any issue of

fact" (R. 40). It is accordingly held that the lower court erred not only in allowing the Government's motion for summary judgment but also in overruling respondents' motion for summary judgment and directed entry of judgment in their behalf, remanding the case for the sole purpose of assessing their damages. Circuit Judge Duffy, while agreeing that the decision of the district court should be reversed, dissented on the ground that the record failed to show that plaintiffs were entitled to a judgment as a matter of law (R. 41). Showing that much of the evidence relied upon by the majority was in dispute, he took the position that the case should be remanded for a trial on the merits (R. 44). A petition for rehearing was denied on January 10, 1951, by opinions in which the majority and dissenting judges adhered to their original views (R. 30-44).[6]

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[6] The opinion denying the petition for rehearing withdrew the court's previous opinion handed down on September 5, 1950. See *supra*, p. 2. Comparison of the two opinions shows that the withdrawal of the earlier opinion did no more than enable the court to avoid reliance upon the Act of February 1, 1928, c. 15, 45 Stat. 54, 16 U.S.C. 457, as the basis for holding Illinois statutory law applicable. The 1928 Act makes applicable to injuries sustained within a national park or other federal reservation the laws of the state within which the reservation is located. Since the injuries in the instant case were sustained by plaintiffs in the City of Lake Forest (R. 5), rather than on the Fort Sheridan military reservation, it seems that the 1928 Act is not pertinent. The majority opinion on the petition for rehearing, unlike the earlier opinion, accordingly avoided any reliance on the 1928 Act (R. 33). In any event, the 1928 Act could not adopt the Illinois statute originally relied upon by the court below, which did not come into existence until 1939. *Murray* v. *Gerrick & Co.*, 291 U.S. 315, 318.

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

1. In refusing to apply the provisions of Section 2680(a) of the Federal Tort Claims Act, which exclude from that Act (a) claims based on an act or omission of a government employee, exercising due care, in the execution of a statute or regulation, and (b) claims based upon the performance of a discretionary function by a Government agency or employee, whether or not the discretion involved be abused.

2. In holding the United States liable under the Federal Tort Claims Act for the failure of the Army to conform to Illinois statutory requirements in storing grenades within an Army installation in that State.

3. In failing to hold that the only liability which the United States has assumed under the Federal Tort Claims Act is the *respondeat superior* type of liability.

4. In holding that the allegedly negligent storage of the smoke grenades by the Army was the proximate cause of respondents' injuries.[7]

5. In holding that cross-motions for summary judgment necessarily left undisputed any issue of fact.

[7] This petition does not discuss the question of proximate cause. That question, which the court below said was "the most serious impediment to plaintiffs' right to recover" (R. 36), will, however, be briefed by the United States if this petition for a writ of certiorari is granted.

6. In holding that the district court erred (a) in denying respondents' motion for summary judgment and (b) in allowing petitioner's motion for summary judgment.

REASONS FOR GRANTING THE WRIT

Only by completely ignoring the sweeping language of 28 U. S. C. 2680(a), *infra*, p. 24, which contains the most important exceptions in the Federal Tort Claims Act, was the court of appeals able to hold the United States liable in damages for injuries alleged to have occurred because of the manner in which the Army stored smoke grenades at the Fort Sheridan military reservation.[8] The erroneous decision below opens wide the door to a multitude of claims for injuries growing out of regulatory and statutory duties and functions performed by Government employees with the exercise of due care, or in performing discretionary acts, despite the fact that liability flowing from such acts is plainly excepted from the purview of the Federal Tort Claims Act by the provisions of Section 2680(a). Consequently, the instant case is an apt vehicle for consideration and decision by this Court of the important question of the scope and coverage of Section 2680(a). Moreover, the decision of the court below is based, at least in part, upon the assumption that state statutory ex-

[8] We are advised that these exceptions were strongly urged upon the court below at the rehearing, with special emphasis upon the court's holding in *Sickman* v. *United States*, No. 511, this Term, now pending on a petition for a writ of certiorari.

plosives requirements are binding on the United States and apply to the Army's storage and handling of its grenades and other munitions within federal military reservations. This principle of federal accountability to state law in such matters will seriously interfere with the munitions and explosives storage systems now used by the Army, Navy, and Air Force in their installations throughout the states, as well as with many other federal activities undertaken in accordance with special legislation or regulations which differ from state laws. In addition, the court's holding that cross-motions for summary judgment left undisputed any issue of fact presents a square conflict with decisions of the Courts of Appeals for the Second, Sixth and District of Columbia Circuits.

1. Section 2680(a) excepts from the coverage of the Federal Tort Claims Act claims based upon an act or omission of a government employee, exercising due care, in the execution of a statute or regulation. It also excludes from the Act claims based upon the performance of a discretionary function by a Government agency or employee, whether or not the discretion involved be abused. We submit that each of these two exceptions prevents the instant claims from being cognizable under the Act.

a. *The acts and omissions complained of were in the execution of statutes and regulations.* Respondents' case is based essentially on the claim that the Government was negligent in failing to

store its grenades in a manner which would prevent injury to respondents (R. 4). But there can be no real doubt that the grenades were stored in strict compliance "with army directions for the storage of such grenades" (R. 14, 42). Although these grenades were stored in the open rather than within a building, such outdoor storage is an approved form of storage for the type of grenade here involved and is expressly authorized by pertinent Army regulations. See Army Technical Manual 9-1900, Ammunition, General (June, 1945), p. 262;[9] Army Technical Manual 3-300, Miscellaneous Chemical Munitions (March, 1944), p. 32.[10] Since the only act complained of by the plaintiffs concerns the manner of storing the grenades, and since the grenades were stored in strict accordance with Army regulations, it follows that the government employees in charge of the grenades exercised due care in executing the regulations governing the storage of such articles. Consequently, the instant claims fall squarely within the first exception appearing in Section 2680(a), to the effect that the Federal Tort Claims Act shall

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[9] In authorizing ammunition to be "piled in the open," this regulation also provides for use of tarpaulins.

[10] This regulation provided that "tarpaulin shelters must be erected if buildings are not available." The Army's policy of storing grenades outside is apparently a continuing one, since the 1950 revision of the same Manual contains a similar provision and also an additional provision which reads as follows: "if storage areas are well planned and maintained, chemical grenades may be safely stored in the field." See Army Technical Manual 3-300, Miscellaneous Chemical Munitions (March, 1950), p. 29.

not "apply to—(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation."

b. *The acts and omissions complained of were in the exercise of a discretionary function or duty.* Equally clear is the applicability of the second part of Section 2680(a), excepting claims arising out of the performance of a discretionary function. There can be no question that the planning of a storage program for smoke grenades, and a decision to store them in the open, rather than within a building, necessarily calls for the exercise of judgment in selecting one of two or more equally reasonable alternatives. This selection, in turn, must be based upon consideration of such factors as the combustibility of the grenades, the use of building space for more dangerous ammunition, the frequency of use of such grenades in military training, and the general availability of adequate storage space.

Other programs, calling for the making of similar policy determinations and the exercise of value judgment, have been viewed as involving the exercise of "discretionary functions" so as to make conclusive upon the courts the administrative selection of any reasonable alternative. See, *e.g., Decatur* v. *Paulding,* 14 Pet. 497, 514, 515; *Riverside Oil Company* v. *Hitchcock,* 190 U.S. 316; *Wilbur* v. *United States,* 281 U.S. 206. There is no reason to believe that in the Federal Tort Claims Act

Congress intended to establish any different criterion for "distinguishing a discretionary function from administrative action or performance of an identified task or job of work." *Coates* v. *United States,* 181 F. 2d 816, 817-818 (C.A. 8). And the legislative history of that Act confirms the view that Congress "very deliberately used the words 'discretionary function or duty' in the Exceptions to the Act with the intent that they should convey the same meaning traditionally accorded by the courts and to continue to exclude judicial authority from interference with lawful legislative and executive action." *Coates* v. *United States,* 181 F. 2d 816, 818 (C.A. 8). In light of these considerations, we submit that the policy determinations involved in the formulation by the Army of a munitions storage program make it difficult to point to any better example of the exercise of "discretionary function" contemplated by this exception to the Federal Tort Claims Act. See *Thomas* v. *United States,* 81 F. Supp. 881 (W.D. Mo.); cf. *Pacific National Fire Insurance Company* v. *T.V.A.,* 89 F. Supp. 978 (W.D. Va.).

The error of the court below in failing to apply either of the two exceptions in Section 2680(a) is underscored by that court's recent use of both exceptions to deny jurisdiction to a district court to adjudicate crop damage claims asserted against the United States on account of depredations by wild geese protected by the Migratory Bird Treaty Act. *Sickman* v. *United States,* 184 F. 2d 616,

pending on petition for certiorari, No. 511, October Term, 1950.[11] The *Sickman* case was decided by the court below on October 24, 1950, when it had under consideration the Government's petition for rehearing in the instant case. While the *Sickman* opinion was based almost exclusively on the two exceptions in Section 2680(a), the court's opinion denying the petition for rehearing in the instant case makes no attempt to show why those same exceptions are not even more apposite here.

One additional consideration further emphasizes the error of the court of appeals on this aspect of the case. Portions of the court's opinion indicate that it may have proceeded on a theory which would make the United States liable merely because of its ownership of dangerous explosives "calculated to do great harm" (R. 35). But the Federal Tort Claims Act furnishes no basis for reliance on such a theory. The Act recognizes only a *respondeat superior* liability on the part of the United States. See 28 U.S.C. 1346(b), *infra*, p. 23, which confers jurisdiction on the federal courts only of the specified claims against the United States "caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment." *United States* v. *Campbell*, 172 F. 2d 500 (C.A. 5), cer-

[11] By memorandum filed on March 12, 1951, we have acquiesced in the petition for certiorari because the questions which that case raises with respect to the meaning of the exceptions in Section 2680(a) are obviously important.

tiorari denied, 337 U. S. 957; *United States* v. *Eleazer,* 177 F. 2d 914 (C.A. 4), certiorari denied, 339 U.S. 903. Liability under the Act must therefore be predicated on the conduct of an employee who himself could be legally answerable for that conduct in an action for damages. Since liability based upon ownership or control of a dangerous instrumentality is not a *respondeat superior* liability, it is not cognizable under the Act. See *Fries* v. *United States,* 170 F. 2d 726 (C.A. 6), certiorari denied, 336 U.S. 954; *Lauterbach* v. *United States,* 95 F. Supp. 479, 482 (W.D. Wash.); *Murphey* v. *United States,* 79 F. Supp. 925, 927-928 (N.D. Cal.), reversed on other grounds, 179 F. 2d 743 (C.A. 9); *Glasgow* v. *United States,* 95 F. Supp. 213 (N.D. Ala.); Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act,* 47 Mich. Law Review 341, 350 (1949).[12]

2. The holding of the court below that, in order to avoid liability, Army storage and handling of explosives within a military reservation under exclusive federal control must conform to the Illinois statute, likewise constitutes serious and far-reaching error. It is settled law that "the activities of the Federal Government are free from regulation by any state." *Mayo* v. *United States,* 319 U.S. 441, 445. This principle, which precludes

[12] Unlike the Federal Tort Claims Act, the Crown Proceedings Act makes the Crown liable in respect of any breach of duties attaching at common law to the ownership or control of property. Crown Proceedings Act, Section 2(1)(c).

the states from interfering with federal operation of soldiers' homes (*Ohio* v. *Thomas,* 173 U.S. 276), and federal distribution of fertilizer (*Mayo* v. *United States,* 319 U.S. 441), applies even more forcefully here to prevent state regulation of military operations as critical as the storage and handling of explosives. Yet, under the decision below, the Federal Government will be effectively required to comply with state regulations in a particularly sensitive field and the state will thus be enabled to do indirectly that which it could not do directly. The serious and difficult obstacles resulting from the imposition of the various state statutory restrictions [13] on the Army explosives program cannot be overestimated.[14] Moreover, the general principle announced by the court of appeals would also seem to extend to a number of

[13] At least six states have laws similar to the Illinois statute and require that explosives be stored in a building. Deering Cal. Code, Health and Safety, sec. 12,000 *et seq.;* Revised Codes of Montana (1947), sec. 69.1901 *et seq.;* New Jersey Stat. Ann., sec. 21:1A-1 *et seq.;* N.Y. Labor Law (McKinney) sec. 450.1 *et seq.;* Ohio General Code Ann., sec. 5903.1 *et seq.;* Remington's Rev. Stat. of Wash. Ann., sec. 5440.1 *et seq.*

[14] The Army Assistant Judge Advocate General, in a letter dated October 13, 1950, has advised us that he reads the decision of the court below as requiring the Army "to comply with all the laws and regulations pertaining to the storage of explosives now existing in the several states wherein military reservations are situated and at which explosives may be stored. If this decision is allowed to stand, an extensive modification in the Government's program for storage of ammunition and explosives will be necessary in order to bring it within the standards of the several states in which military reservations are located." While this letter concerned the September 5, 1950, opinion, it is equally identical with the early opinion in all respects here material. See *supra,* p. 10, note 6.

other areas of federal activity in which there exists a body of state legislation—thus subjecting the United States to the large, indefinite, and unprecedented burden of complying with otherwise inapplicable state regulations or of suffering the consequences.

Nor can reliance on the Federal Tort Claims Act requirement that a properly cognizable claim be determined "in accordance with the law of the place where the act or omission occurred" minimize or justify these obstacles. (See R. 33-34). Application of that requirement here would force abandonment of a definite and uniform Army explosive storage practice in favor of the differing standards imposed by the laws of the various states in which Army reservations are located. Since such an unreasonable result should not be imputed to Congress, the presence of that statutory requirement simply serves as an additional reason showing that claims founded on alleged violation of such special state statutes are not cognizable under the Act. *Feres* v. *United States*, 340 U.S. 135, 142-144.

3. Prior to the instant decision, it was apparently well-settled that "It does not follow that, merely because each side moves for a summary judgment, there is no issue of material fact. For, although a defendant may, on his own motion, assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show that, if plaintiffs' legal theory be

adopted, a genuine dispute as to a material fact exists." *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780, 784 (C.A. 2), certiorari denied, 328 U.S. 870; *Begnaud* v. *White*, 170 F. 2d 323, 327 (C.A. 6); *Garrett Biblical Institute* v. *American University*, 163 F. 2d 265, 266 (C.A. D.C.). Completely overlooking the cited cases, the court below deprived the United States of its right to a trial on the merits by ruling that "the fact that both sides moved for a summary judgment * * * [left] undisputed any issue of fact." (R. 40). This ruling, presenting a direct conflict with the better-reasoned decisions of the Courts of Appeals for the Second, Sixth and District of Columbia Circuits, should also, we submit, be reviewed by this Court.

In this connection, it is significant, as demonstrated in the dissenting opinion, that the record before the court below "clearly disclose[d] that there are issues of material facts" (R. 44). In these circumstances," Surely this is a case where there should be a trial on the merits." (Dissenting opinion R. 42). On other occasions, the court below itself has recognized that the least that the defendant is entitled to in such a situation is that "the case should proceed to trial." *M. Snower & Co.* v. *United States*, 140 F. 2d 367, 369 (C.A. 7). Thus, not only the uncertainty created by the conflict of the instant decision with those of other circuits should be removed, but also that created by the inconsistent rulings of the court below.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition should be granted.

PHILIP B. PERLMAN,
Solicitor General.

APRIL 1951.

APPENDIX

1. Sections 1346(b), 2674 and 2680(a) of Title 28, Supp. III, United States Code [formerly provisions of the Federal Tort Claims Act]: [15]

Section 1346. *United States as defendant*

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2674. *Liability of United States*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest

[15] See *supra*, p. 3, note 1.

prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

Section 2680. *Exceptions*

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

2. The Act of Illinois of July 12, 1939 (Laws of Illinois, 1939, p. 508; Jones, Illinois Statutes Annotated, Vol. 2A, Sections 15.23(1) *et seq.*, 1947; Chapter 93, Sections 143 *et seq.*, Illinois Revised Statutes) provides in pertinent part:

Section 1. This Act shall apply to the manufacture, possession, storage, transportation, sale or gift of explosives as defined in subdivision 1 of Section 2.

Section 2.1. "Explosive" or "explosives" means any chemical compound or any mechanical mixture containing any oxidizing and combustible units or other ingredients in such proportions, quantities or packing that an ignition by fire, friction, concussion, percussion or detonator of any part of the compound or mixture may cause sudden generation of highly heated gases that the resultant gaseous pressures are capable of producing destructive effects upon life, limb or contiguous objects, but does not mean gasoline, kerosene, naphtha, turpentine, benzine, *butane, propane,* colloided nitrocellulose in sheet or rods or grains not under one-eighth of an inch in diameter, wet nitrocellulose and wet nitro starch containing twenty per centum or more moisture or wet picric acid containing or being in ten per centum or more moisture. Manufactured articles such as fixed ammunition for small arms, fire crackers, safety fuse, matches, et cetera, shall not be held to be explosives when the individual units contain explosives in such limited quantity, of such nature or in such packing that it is impossible to produce a simultaneous or a destructive explosion of such units, to the injury of life, limb or property.

* * * * *

8. "Department" means Department of Mines and Minerals.

Section 3. Except only in a factory building or upon its premises and except while being

blasted, no person shall possess or store explosives, unless such explosives are completely enclosed or encased in tight metal, wooden or fibre containers. A person having an explosive in his possession or control, shall, under no circumstances, permit any grains or particles of it to remain on the outside of or about its container. Every container shall be plainly marked with the name of the explosive contained therein.

Section 4. Except while being transported or blasted or while in the custody of a common carrier awaiting shipment or delivery to a consignee during the time permitted by federal law, all explosives shall be stored, in magazines in accordance with sections 5 to 9, inclusive. Not more than three hundred thousand pounds shall be stored in any magazine at any one time.

Section 5. Magazines in which explosives shall be lawfully kept or stored shall be constructed of brick, concrete, iron or wood covered with iron, and shall have no openings except for ventilation and entrance.

Blasting caps, detonating or fulminating caps or detonators in quantities of one thousand or over, shall be kept or stored in a separate magazine and a certificate of compliance shall be obtained from the Department. Blasting caps, detonating or fulminating caps or detonators, in quantities of less than one thousand shall be kept or stored in a separate locked magazine.

Section 6. The doors of magazines shall be kept closed and locked at all times, except when opened for storage or removal of explosives by persons lawfully entitled to enter the same. Sufficient openings shall be provided for ventilation and shall be screened to prevent the entrance of sparks, except that magazines containing only black powder may be constructed without openings for ventilation. Upon each end of such magazine, above the side walls thereof, or upon its barricade, there shall at all times be kept conspicuously posted a sign with the words "Magazine—Explosives—Dangerous" legibly printed thereon in letters not less than six inches high. No matches or fire of any kind shall at any time be permitted in any magazine. No blasting caps or other detonating or fulminating caps or detonators shall be kept or stored in any magazine in which other explosives are kept or stored. No package of explosives shall at any time be opened within fifty feet of any magazine, nor shall any explosive be kept therein except in the original containers. Except for testing purposes in accordance with section 11, no person shall discharge firearms within five hundred feet of a magazine or factory building, or at or against any such building or magazine.

* * * * *

Section 8.1. No person shall have, possess, keep or store explosives until he has obtained a certificate of compliance from the Department. This section shall not apply where holes are

drilled and the explosives are obtained and loaded into the holes for immediate blasting. Every person shall report to the Department, on blanks to be furnished by it:

a. The location or proposed location of the magazine;

b. The kind and maximum quantity of explosives stored or intended to be stored therein;

c. The distance or intended distance of the magazine from the nearest magazine, building, railroad and highway.

* * * * *

4. The owner or user of a magazine shall annually pay to the Department in advance a license fee graduated according to the quantity of explosives authorized to be stored in the magazine. The fee shall not be less than five dollars nor more than twenty-five dollars and shall be paid into the State treasury by the Department.

* * * * *

Section 12. Whoever fails to comply with or violates any provisions of this Act shall be guilty of a misdemeanor, and upon conviction shall be fined not less than $100 nor more than $500 for each offense, or be imprisoned in the county jail for not less than thirty days nor more than six months, or be both so fined and imprisoned in the discretion of the court.

Section 13. This Act shall be administered by the Department of Mines and Minerals. The

Director shall appoint qualified inspectors to visit periodically places where explosives may be stored and to make the inspections provided for in this Act. Such inspectors shall have power to enforce compliance with this Act and to make arrests if necessary.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1950

No. 665

UNITED STATES OF AMERICA,
Petitioner,

vs.

WALTER B. STEWART, SINCLAIR STEWART AND DONALD STEWART
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN S. BURCHMORE,
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REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Walter B. Stewart, Sinclair Stewart and Donald Stewart oppose the petition of the Solicitor General for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, and pray that the final judgment entered by that court in this case on January 10, 1951, be permitted to take effect without further review or litigation.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit on petition for rehearing (R. 30-44) is reported at 186 F. 2d 627. The original opinion of that

Court, dated September 5, 1950, was withdrawn in the order denying the petition for rehearing (R. 45), is not printed in the record (R. 30), and is not reported. The United States District Court delivered no opinion.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1254(1) to review this case upon writ of certiorari to the court of appeals. For the reasons stated below, respondents urge that this case does not fairly present questions of the character usually considered by this Court as sufficient for the exercise of its discretionary power to review by writ of certiorari. U.S. Sup. Ct. Rule 38, par. 5(b).

QUESTIONS PRESENTED

The petition sets forth (page 2) certain questions which, as stated, appear to afford grounds for certiorari. Respondents deny that this case presents such questions in the manner stated by petitioner.

1. The question posed first is new to the case; it belatedly conceives the possible application of the exceptions to the Federal Tort Claims Act as set forth in 28 U.S.C. 2680(a). Respondents urge that the case does not present any determinable question under that section, which is unrelated to the record before the Court. The pleadings did not raise the defense or allege facts essential thereto. The applicability of Section 2680(a) was not presented to or argued before the district court or the court of appeals, and was not passed upon by the courts below. In raising this question for the first time by petition for writ of certiorari, the United States abandons the defense that was urged in the court below, *i.e.* the exception contained in 28 U.S.C. 2680(j); it now shifts grounds to an exception which depends for its application upon the existence of facts not

shown or alleged in the record. Further, petitioner's supporting quotations are from documents of unknown origin, not in the record, and which contain language fatal to petitioner's argument.

2. By the second question presented, petitioner inquires whether Illinois law "rather than" Army regulations govern Army storage of smoke grenades at Fort Sheridan. The case does not present that question so phrased because no Army "regulations" are pleaded, cited, or set forth in the record, and there is no showing by petitioner that any such regulation exists contrary in its requirements to the Illinois law. The question truly presented is whether, in the absence of Federal statute or regulation, Illinois law governing the storage of explosives determines the rights of parties injured as the results of acts or omissions of Federal employees. In view of the express provision of 28 U.S.C. 1346(b) that question is not substantial.

3. The case does not present the third question in the manner stated by petitioner because (a) the court of appeals did not deny defendant the right to a trial on the merits; defendant did not seek such trial nor urge that an issue of material facts existed, and (b) in ordering summary judgment for respondents the court of appeals did not proceed on the theory that counter motions for summary judgment necessarily remove all disputed issues of fact. The substantial question presented and decided by the court below was whether there was a genuine issue of material facts. Respondents doubt that such question is of the character ordinarily regarded by this Court as presenting grounds for certiorari.

STATUTES INVOLVED

Although the petition sets forth 28 U.S.C. 2680(a) which excepts acts "in the execution of a statute or regulation" no such statute or regulation is set forth in the petition.

Supplementing the petition, 28 U.S.C. 2680(j) is set forth in Appendix A *infra*, page 21. The application of that section was urged on petition for rehearing.

STATEMENT

The petition states "the undisputed facts" (pp. 3-10). The evidentiary facts there set forth are those upon which respondents relied and which were recited by the court of appeals in its opinion as a basis for its conclusions of law entitling respondents to summary judgment (R. 31-2). It is apparent that there is no genuine issue or dispute as to those facts; the petition points to no issue on which the United States desires a trial on the merits. The recital in the opinion of the court below presents the same facts in the manner in which respondents would present them (R. 31-2).

There are omissions and inaccuracies in petitioner's statement in respect of matters that do not go to the merits of respondents' claim or present any issue of evidentiary fact calling for a trial on the merits.

1. On page 7 of the petition it is stated that the complaint alleges negligence in that government employees " 'wrongfully and negligently placed said fireworks and grenades on the open ground not inside of any building or magazine but merely within a so-called magazine area surrounded by a wire fence, where said fireworks were clearly visible.' " Later, page 14, petitioner urges as significant that "the only act complained of by the plaintiffs concerned the manner of storing the grenades".

As to this, the complaint did not allege only negligent storage; it further alleged negligence in that "said employees of the defendant, United States, wholly failed to maintain a guard over said fireworks; to store them within the prescribed magazine; to post with the required sign and warning; or to prevent the removal of said fireworks from the premises" (R. 4). Further, that the employees of the United States "wholly failed and refused to make search or take action for the recovery of said fireworks or for the protection of the public from accidental explosions thereof or for the information of the public as to the appearance, nature, propensities or dangers inherent in said fireworks" (R. 5).

We point to this omission in petitioner's statement because the negligence complained of did not relate solely to the manner of storage, but to the failure to take ordinary precautions. It was negligence not only to store the grenades in the manner in which they were stored, but to do so in a reservation open to the public, without posting a guard, and without concealing the "fireworks" sign from the eyes of curious invitees.

2. Petitioner's statement says (page 4), "*In accordance with Army directions*, the boxes of grenades were stacked in the open, not within a building, and were covered over the top with a tarpaulin". Later (page 14) "there can be no real doubt that the grenades were stored in *strict* compliance 'with Army directions for the storage of such grenades' ". And again on the same page, "since the grenades were stored in *strict accordance with Army regulations*, it follows that the government employees in charge of the grenades exercised due care in executing the regulations governing the storage of such articles". These statements, apparently intended to imply *strict* following of prescribed regulations, in support of the newly conceived defense of Section 2680(a), are not supported by the record.

The undisputed facts are these: The complaint alleges (R. 3), "7. The laws of the United States and the regulations of the United States Army in such cases made and provided, require and at all times mentioned herein required the exercise of certain precautions and specified certain minimum safeguards to the storage, handling and guarding of said fireworks and grenades".

The answer of the United States denies *breach* of regulations (R. 7), "7. The allegations of paragraphs 7 and 8 of the complaint require no answer as said allegations are the erroneous conclusions of law of the plaintiffs. However, defendant denies the breach of duty imposed by any applicable statute, regulation or otherwise". *The answer did not allege facts giving rise to the affirmative defense of exercise of statutory or regulatory duty or discretion.*

In plaintiffs' interrogatories, the following demand was made (R. 11): "6. Describe, identify and list the documents published by the defendant or the United States Army having to do with storage, handling and guarding of hand smoke grenades". And, "7. Where were hand smoke grenades stored during the first three months of 1947 within the grounds at Fort Sheridan? Describe whether such grenades were stored within a building or in the open, whether upon the ground or on a structure, whether covered or uncovered, whether surrounded by a fence, and if so, what type of fence, and whether visible or invisible to persons outside of the fence, if any".

The answer to the foregoing interrogatories (R. 13) stated (italics supplied), "6. Answering paragraph 6 of said interrogatories defendant says that the following documents are published by the United States of America concerning the handling and guarding of hand smoke grenades: TM 9-1900, TM 3-300. 7. Answering paragraph 7 of said interrogatories, defendant says that hand smoke

grenades were stored within the grounds of Fort Sheridan during the first three months of 1947. The hand smoke grenades were stored within a fenced-in enclosure at the North end of the reservation. This enclosure is created by a cyclone type wire fence six feet high with three strands of barbed wire extending an additional one foot above the fence. The grenades were stored in the open *in accordance with Army directions for the storage of such grenades.* They were stored on the ground and covered with a tarpaulin. The grenades were packaged in wooden packing boxes, and, while these packing boxes so covered by the tarpaulin may have been visible through the wire cyclone fence in the immediate vicinity of the magazine area, they were not visible from points outside of the reservation".

These undisputed facts, without more, warrant only the conclusion that the record does not sustain respondents' charge that the method of storage was contrary to any federal statute or regulation. They do not warrant the conclusion, necessary to petitioner's argument, that the method of storage was required by or provided for in any federal statute or regulation.

3. Petitioner refers to matter not in this record and not set forth in the petition to show that "such outdoor storage is an approved form of storage for the type of grenade here involved", and that the grenades "were stored in strict accordance with Army regulations" (page 14). For this purpose petitioner quotes certain phraseology from War Department Technical Manual 3-300 (March, 1944 and March, 1950), and from War Department Technical Manual 9-1900 (June, 1945).

There is nothing in the record to show whether these documents constitute "regulations". They are characterized by the United States as "documents published by the United States of America concerning the handling and

guarding of hand smoke grenades" (R. 13). Examination of War Department Technical Manual 9-1900 (June, 1945)[1] indicates that such documents are not regulations, but merely text material for the information of employees. The manual refers to regulations in paragraph 167(b): "General storage regulations are contained in AR [Army Regulations] 700-10."

Further examination of the manuals discloses that, so far from "authorizing ammunition to be 'piled in the open'," (Petition, footnote 9, page 14), outside storage of explosives and ammunition is neither desirable nor recommended and "must be resorted to only as an emergency expedient. In order that outside storage of explosives and ammunition may be kept to a minimum, full advantage must be taken of the cubic capacity of all magazines, within the limits prescribed by this manual. When it becomes necessary to utilize outside storage within the continental United States, it shall be in accordance with the distance requirements of paragraph 172". War Department Technical Manual 9-1900 (June, 1945), page 227. The same manual

[1] Upon request made to the Solicitor General, counsel for respondents was permitted to inspect the technical manuals in accordance with the terms of his letter of May 11, 1951, addressed to the United States Attorney at Chicago, with copy to counsel for respondents, reading as follows:

> In connection with our petition for certiorari in the above case, Mr. Burchmore, counsel for the respondents, has requested permission to inspect TM 3-300 (March 1950) and TM 9-1900 (June 1945), cited at pages 3, 4 and 14 of the petition. Since these Technical Manuals are "Restricted", the Army will permit him to inspect the pertinent portions of the Manuals only if the inspection is made in your office and under your supervision.
>
> I am therefore enclosing the two Manuals and request that you allow Mr. Burchmore or his representative to inspect the pertinent portions of the Manuals in your office and under your supervision. It is also requested that you return these "Restricted" materials to me as soon as possible after the inspection has been made.
>
> A copy of this letter is being mailed to Mr. Burchmore.

provides that "magazines and areas in which there are explosives and ammunition will be guarded adequately at all times. Magazine areas should be protected by non-climbable fences" and "guards protecting ammunition and explosives, will not be armed with rifles. Generally, shotguns are recommended for guard purposes" (p. 224).

Manifestly, the undisputed fact that the Baldwins and Toogood climbed the magazine area fence shows it was not a 'non-climbable fence" (R. 17). Nor was it guarded, according to the undisputed fact that there was only a roving patrol covering the entire reservation (R. 14).

4. Finally, respondents disagree with the statement (page 9) that the court below "assumed that the cross-motions for summary judgment had left 'undisputed any issue of fact' ". This is petitioner's characterization of the action of the court below, based upon a single phrase in the closing paragraph of the opinion (R. 40). While the opinion speaks for itself, we think a reading of the opinion as a whole indicates that a more accurate statement would be that the court found no genuine dispute as to a material fact (R. 31).

REASONS FOR DENYING THE WRIT

The Court of Appeals did not pass upon conceivable application of 28 U.S.C. 2680(a) because the defense was not raised by the record, and the matter was not urged on appeal.[2] The instant case presents no real opportunity for consideration and decision by this Court of the important general question of the scope and coverage of Section 2680(a) because the record contains no facts from

[2] Contrary to footnote 8 on page 12 of the petition, 28 U.S.C. 2680(a) was not "strongly urged" or even cited to the court below. The petition for rehearing is set forth in full in Appendix B. There was no rehearing or oral reargument and Section 2680(a) was never mentioned in the courts below. (R. 45)

which a conclusion could be reached as to whether the government employees exercised statutory duties, or performed discretionary acts. The decision of the court below was not based upon the mistaken theory that state laws override federal statutes and regulations, but upon the express provision of 28 U.S.C. 1346(b) that claims against the United States for injury or loss of property shall be determined "in accordance with the law of the place where the act or omission occurred". The only Army publications cited by petitioner recognize and require compliance with local laws and regulations, and the United States has accepted state statutory provisions as binding until superseded by federal statute or regulation. Finally, the action of the court of appeals in directing summary judgment for respondents was based upon its conclusion that no genuine issue of material fact existed and that, as a matter of law upon the undisputed facts, the employees of the United States were negligent and such negligence was the proximate cause of respondents' injuries and losses.

1. Petitioner is mistaken in the statement (p. 12, footnote 8) that the exceptions in Section 2680(a) were "strongly urged upon the court below at the rehearing", and in the further statement that special emphasis was made to that court of its holding in *Sickman* v. *United States,* No. 511 this term.

There was no rehearing in the court below (R. 45), and the petition of the United States for rehearing made no mention of Section 2680(a) or of the *Sickman* case. Examination of that petition, set forth in full in Appendix B, shows that only the exception contained in Section 2680(j) was urged upon the court below. The application of that section, which excepts claims arising out of combatant activities of the armed forces, was passed upon by the court of appeals, and petitioner's contention was rejected

without mention in the opinion. *Johnson* v. *United States*, 170 F. 2d 767 (C. A. 9, 1948); *Skeels* v. *United States*, 72 F. Supp. 372 (D.C.W.D. La., 1947).

The pleadings do not raise the defense suggested by Section 2680(a), although it contains matter by way of affirmative defense which should be raised in the pleadings by appropriate allegations of fact. At least one district court has recognized that unless the pleadings show on their face the applicability of 2680(a) that must be raised by way of affirmative defense with the burden upon the government to establish its applicability. *Boyce* v. *United States*, 93 F. Supp. 866 (D.C.S.D. Iowa, 1950).

The manuals which the petition cites for the first time manifest the impossibility of judicial determination of any question under 2680(a) without affirmative pleading and proof in the record. Outside storage is to be "resorted to only as an emergency expedient". And, "full advantage must be taken of the cubic capacity of all magazines. When it becomes necessary to utilize outside storage within the continental United States, it shall be in accordance with the distance requirements of paragraph 172". War Department Technical Manual TM 9-1900 (June, 1945, p. 227). If that is the "statute or regulation" which petitioner relies upon for its defense under Section 2680(a), then the burden devolves upon the United States to allege and show "an emergency" and that "full advantage" was taken "of the cubic capacity of all magazines" and that the "distance requirements" were complied with.

The requirement of the same manual for a "non-climbable" fence and for "adequate guard" indicates a fatal defect to any supposed defense under Section 2680(a). The fact that the fence was climbed infers that it was not "non-climbable". *Res ipsa loquitur.*

Section 1346(b) confers jurisdiction on the district court

subject to the provisions of Section 2680(a). Even though it be considered that the question is therefore one of jurisdiction and may be raised at any time, yet this Court has refused to pass upon such jurisdictional question when the jurisdictional facts were not in the record. *Chappell Chemical & F. Co.* v. *Sulphur Mines Co.*, 172 U.S. 474, 43 L. ed. 520 (1899).

Petitioner argues that the court of appeals erred in failing to hold that the Federal Tort Claims Act recognizes only a *respondeat superior* liability. The argument is based upon the suggestion that the decision below may have been grounded upon mere ownership or control of explosives rather than upon negligent acts or omissions of Federal employees. The court of appeals found "no occasion either to embrace or reject this theory of liability" (R. 32).

Upon the record before this Court the instant case does not, we submit, present an apt vehicle for determining important general questions as to the scope and effect of the exceptions in Section 2680(a). This is well illustrated by the circumstance that the petitioner does not choose which of the two exceptions is thought to be applicable; it argues that both exceptions apply. It is difficult to conceive of acts or omissions which could at the same time be "exercising due care, in the execution of a statute or regulation", and "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the government". The two exceptions appear to be exclusive, rather than synonymous.

2. The court below did not assume that state statutes are binding on the United States, or that Illinois law governs the Army "rather than" federal statutes and regulations. Neither in the court below or in its petition has the United States cited any federal statute or regulation which is

contrary to the local law which the court of appeals adopted as determinative of the issues of negligence and proximate cause. The court did assume in accordance with Section 1346(b) that respondents' claim for personal injuries caused by the negligence or wrongful act of government employees was to be determined "in accordance with the law of the place where the act or omission occurred".[3]

It is not, as petitioner suggests, unthinkable that Congress should require tort claims against the Army to be determined by the varying standards of the states in which Army reservations are located. In fact, the Army has itself instructed its employees to comply with varying state standards in the matter of packing, marking and shipping explosives and ammunition. The manuals cited by petitioner specifically so provide. War Department Technical Manual TM 9-1900 (June, 1945) provides as follows (p. 271):

SECTION V, SHIPPING

184. Regulations and references.

c. State and municipal laws, ordinances and regulations. In addition to the Federal laws governing interstate transportation of explosives and other dangerous articles, each state and nearly all municipalities have laws or ordinances regulating the transportation of explosives and other dangerous articles within their jurisdiction. Shipments of explosives and ammunition will comply with applicable requirements of Interstate Commerce Commission regulations, Port and Harbor

[3] We disagree with the statement of petitioner (page 10, footnote 6) that 16 U.S.C. 457 could not in any event adopt the Illinois statute because the Illinois statute did not come into existence until 1939. *Murray* v. *Gerrick & Co.*, 291 U.S. 315, 78 L. ed. 821 (1934) relied on 16 U.S.C. 457 to apply within Puget Sound Navy Yard a state wrongful death statute enacted after cession of the federal enclave, the Court saying (p. 319): "This plainly means the existing law, as declared from time to time by the state."

> regulations, State and Municipal laws and recommendations by Bureau of Explosives.

Similar language is found at page 267 of the manual with respect to packing and marking.

We respectfully suggest that if these manuals were before the court as part of the record, and if they were shown to be regulations within the meaning of 2680(a), it would be found upon examination that the requirements as to magazines and manner of storage, handling and guarding of ammunition, including chemical ammunition, are more strict than the state statutes in Illinois.

Feres v. *United States*, 340 U.S. 135, 95 L. ed. 134 (1950) does not stand for the proposition that varying state standards were not intended by Congress to be determinative of tort claims based on acts or omissions of Army employees. In that case this Court held that claims of soldiers for service-connected injuries were excluded from Federal Tort Claims Act jurisdiction. In its opinion the Court discussed the impracticability of allowing the geography of an injury to a member of the armed forces to determine the law to be applied to his tort claim. The Court held that determination of servicemen's claims according to the law of the place of the injury would not be a rational plan of providing for those disabled in service, particularly in view of the liberal and nation-wide system of compensation provided in other federal statutes for the benefit of servicemen. The Court did not hold that the provision of Section 1346(b) for the determination of claims "in accordance with the law of the place where the act or omission occurred" was irrational as applied to private claims against the government. This Court there recognized that so far as the liability of the United States was concerned the geography of the place of injury did select the law to be applied (p. 142):

> This provision [Section 1346 (b)] recognizes and assimilates into federal law the rules of substantive law of the several states, among which divergencies are notorious.

3. As the petition correctly states, a motion for summary judgment constitutes an admission only for the purposes of that motion that there exists no genuine issue of a material fact. When such motion is denied, it is always held that the moving party should have an opportunity to show that a genuine dispute exists as to a fact essential to the theory of the case advanced by the opposite party.

The decision of the court of appeals in this case does not run contrary to that principle and there is no conflict between circuits on the question stated.

The court below has itself expressly recognized the principle stated. *M. Snower & Co.* v. *United States*, 140 F. 2d 367, 369 (C.A. 7th, 1944); *Stahly, Inc.* v. *M. H. Jacobs Co.*, 183 F. 2d 914 (C.A. 7th, 1950). In the *Snower* case this court of appeals was presented with the equivalent of counter motions for summary judgment. The court searched the record and found that a genuine issue existed as to a material fact, saying, page 369: "The instant situation is closely analogous to a case in which both plaintiff and defendant have moved for summary judgment when the pleadings presented a genuine issue regarding a material fact. In such a case, no summary judgment of the disputed facts should be granted and the case should proceed to trial".

In summary judgment cases, the crucial question recognized in all circuits without conflict is whether there does exist a genuine issue as to a fact essential to the case of the party for whom judgment is entered. In the *Walling* case, cited by petitioner, the court affirmed summary judgment entered by the district court on the expressed ground

that no such issue was found in the record, *Walling* v. *Richmond Screw Anchor Co.*, 154 F. 2d 780 (C.A. 2d). In the *Begnaud* case, the court of appeals reversed a grant of summary judgment because of the existence of an issue of material fact. *Begnaud* v. *White*, 170 F. 2d 323 (C.A. 6th). In the *Garrett* case the court of appeals reversed a grant of summary judgment on the ground that "on the appellee's theory of the case we are of the opinion that there does exist a genuine issue of material facts". *Garrett Biblical Institute* v. *American University*, 163 F. 2d 265 (C.A. D.C.).

In the case at bar the court of appeals reversed the grant of summary judgment for petitioner and directed the entry of summary judgment for respondents. In doing so, however, it did not proceed, as suggested by petitioner, upon the mistaken theory that no issue of material fact existed merely because of the existence of counter motions for summary judgment. The reference quoted by petitioner from the opinion of the court below to the fact of counter motions must be read in the context in which it appears in the opinion. The court said (R. 40):

> We conclude that the court erred in allowing defendant's motion for summary judgment and dismissing the complaint. In view of what we have held, it is also evident that the court erred in denying plaintiffs' motion for summary judgment. The point is made that we are without jurisdiction to decide this latter issue for the reason that the denial of a motion for summary judgment is interlocutory and, therefore, not appealable. Undoubtedly that is true where the appeal is from such an order, but here there is no question but that the appeal is from a final judgment. Under such circumstances and in view of the fact that both sides moved for a summary judgment, which leaves undisputed any issue of fact, we think we may properly consider any issue of law presented by the record. It follows from what we have held that plaintiffs are entitled to a judgment, and all that remains is the assessment of plaintiffs' damages.

Careful reading of the quoted paragraph, in the light of the opinion as a whole, suggests that the action of the court in directing summary judgment for respondents was taken "in view of what we have held", and "under such circumstances". The court had reviewed the facts revealed by the record (R. 31) and characterized by petitioner itself as "undisputed" (Page 3). Upon those undisputed facts the court below had found negligence as a matter of law (R. 35-6). There being no genuine dispute as to any fact essential to this finding, the court held that it might "properly consider any issue of law presented by the record" (R. 40).

The phrase quoted by petitioner from the opinion of the court was not artfully worded to represent an outright holding that the mere filing of counter motions for summary judgment finally removes all issues of fact. Petitioner did not, at any time, assert that a genuine issue of material fact did exist, and the question whether the court should grant respondents' motion for summary judgment was raised only as a question of jurisdictional power on appeal. In the petition for rehearing [Appendix B, *infra*] this point was argued on the ground that an order denying respondents' motion for summary judgment is not an appealable order. We respectfully submit that it was this contention which the court had in mind when it stated that "there is no question but that the appeal is from a final judgment" [the order granting petitioner's motion] and that on such appeal the court of appeals "may properly consider any issue of law presented by the record" (R. 40).

There is no conflict between the decision of the court in this case and decisions in other circuits. Other circuits recognize the power of a court of appeals to dispose of an order denying summary judgment, as well as an order

granting summary judgment. In *Elder* v. *Brannan*, 184 F. 2d 219 (C.A. D.C., 1950), the same court which decided the *Garrett* case reversed a grant of summary judgment for one party, with directions to the court below to grant summary judgment for the opposing party on the condition that no issue of fact was raised. In this case the court of appeals determined for itself that no issue of fact existed.

Petitioner did not in the court below urge the existence of any issue of fact essential to respondents' case. The petition does not point to any genuine issue. It refers only to observations of the dissenting judge. On careful reading of the dissent, we think it is plain that the factual recitals therein (R. 41) do not negative or join issue with the material facts as to which the dissenting judge thought an issue existed.

Conclusion.

We respectfully urge that this case does not present the important questions phrased by petitioner. In the courts below the case was presented as one in which the essential facts were known, and which involved only questions of the local law of negligence and proximate cause. The petition appears to seek review by this Court of those questions of local law. In its specification of errors, petitioner presents the question of proximate cause, characterized as "the most serious impediment to plaintiffs' right to recover". If a writ were issued in this case the question of proximate cause under Illinois law would be relied upon for reversal. On the other hand, it would not be possible, on this record, to pass upon the scope of the exceptions to the Federal Tort Claims Act. For those questions to be considered judicially it would be necessary to send the case back for amended pleadings and for testimony, affidavits or stipulations to show the facts upon which a

decision could be made as to whether the exception is involved.

Walter Stewart and his sons, Sinclair and Donald, appeal specially to the conscience of this Court and pray that their urgent, personal complaint be not artificially fashioned into a vehicle for judicial clarification of anticipated broad questions of Federal Tort Claims Act scope. Their injuries are grievous,[4] and the litigation already is protracted (R. 2).

We respectfully urge that the petition should be denied.

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May, 1951.

[4] The scholarly, but unrealistic opinion of Judge Duffy presents glaring misunderstanding of the nature of the grenades involved. He suggests "they are designed not to cause great harm" (R. 42), yet petitioner's manual particulary notes that this type of grenade "will cause casualties by burning." War Department Technical Manual 9-1900, p. 78.